No. 91-734

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHWEST AIRLINES, INC.,

Cross-Petitioner,

vs.

WILLIAM D. WEST,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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October 31, 1991

QUESTIONS PRESENTED FOR REVIEW

Where the court of appeals found that passenger boarding and denied boarding services of an airline are air carrier "services" within the meaning of the preemption provision of the statute, did it err when it held that there can be no preemption of state laws of general application which merely have an "effect" on airline services, but only of state laws which are "addressed exclusively to airline services"?

Did Congress require that laws relating to the rates, routes, or services of an air carrier be defined not by the balkanizing forces of state and local regulation, but rather by a uniform nationwide system of federal law?

PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption. American Airlines and Trans World Airlines sought leave to file briefs as *amici curiae* in the court of appeals in support of Northwest Airlines, Inc.'s Petition for Rehearing and Suggestion for Rehearing *en banc*. Permission to file *amici curiae* briefs was denied.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioner, Northwest Airlines, Inc. ("Northwest")[1] requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on September 11, 1990, amended February 5, 1991, which affirmed in part, and reversed and remanded in part, the judgment of the United States District Court for the District of Montana.

[1] Pursuant to Rule 29.1 of this Court, cross-petitioner states that Northwest does not have corporate parents or subsidiaries, the shares of which are publicly traded.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The unpublished opinion and order of the United States District Court for the District of Montana appears in the Appendix to West's Petition in Docket 91-505 ("Pet. App.") at 25a-31a. The first opinion of the United States Court of Appeals for the Ninth Circuit, which was withheld from publication pending a ruling on Northwest's petition for rehearing, appears at Pet. App. 12a-20a. The second opinion, which amended the first and is the subject of this cross-petition, appears at Pet. App. 1a-11a and is reported at 923 F.2d 657 (1991). An order denying rehearing of the amended opinion appears at Pet. App. 21a, and the judgment of the court of appeals appears at Pet. App. 22a.

JURISDICTION

The judgment of the court of appeals was initially entered on September 11, 1990, and amended on February 5, 1991. Cross-Respondent timely filed a petition for rehearing which was denied on June 4, 1991. By order dated August 21, 1991, this Court extended Cross-Respondent's time to file a petition for writ of certiorari to October 3, 1991. That petition was received on October 1, 1991. Cross-Petitioner relies on Rule 12.3 of the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

The Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978), which added Section 105 to the Federal Aviation Act, as amended, now codified as 49 U.S.C. App. § 1305, and entitled Federal Preemption states:

(a) Preemption

(1) [N]o State or political subdivision thereof and no interstate agency or other political

> agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

The Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 (1938) contained a savings clause in § 1106, now codified as 49 U.S.C. App. § 1506, which states:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Section 250.9 of Title 14 of the Code of Federal Regulations (1991) entitled Written Explanation of Denied Boarding Compensation and Boarding Practices states, in relevant part:

> (a) Every carrier shall furnish passengers who are denied boarding involuntarily for flights on which they hold confirmed reserved space immediately after the denied boarding occurs, a written statement . . . .
>
> (b) The statement shall read as follows:
>
> * * * *
>
> **Passenger's Options**
>
> Acceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

STATEMENT OF THE CASE

On September 3, 1986, respondent William D. West ("West") purchased an airline ticket on Northwest Flight 1150 from Great Falls, Montana to Arlington, Virginia. On October 1, 1986, because of the generally lower passenger demand, Northwest made an economic decision to service Flight 1150, which left from Great Falls daily, with a DC-9 instead of a larger Boeing 727. A 727 carries 68 more passengers than a DC-9.

On October 7, 1986, when West arrived at the gate, the flight was overbooked by five persons. Northwest found three volunteers who agreed to give up their seats in return for compensation from Northwest. West and another passenger were involuntarily denied boarding and were offered denied boarding compensation equal to 200% of the value of their tickets. One person accepted the compensation, but West rejected the offer.

Northwest offered West an alternative flight which was scheduled to arrive at Dulles Airport, near his intended destination, six hours later than his originally scheduled flight. He declined this alternative flight because of the inconvenience and chose to make the trip about two weeks later.

West sued under § 404(b) of the Federal Aviation Act of 1958. He does not challenge the district court's dismissal of that claim based on the prior repeal of that section. He also claimed $10,000 in compensatory damages and $50,000 in punitive damages alleging that Northwest breached the covenant of good faith and fair dealing pursuant to Montana law. His suit was removed from state to federal court based upon diversity of citizenship pursuant to 28 U.S.C. §§1332 and 1441. The district court granted Northwest's motion for summary judgment holding that West's state law claim was preempted by 49 U.S.C. §1305, and West appealed.

The ninth circuit agreed that boarding procedures constituted "services" pursuant to the statute stating:

> In this case, we believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here.
>
> * * *
>
> [W]e find that Northwest's passenger services, including boarding, are airline services within the meaning of section 1305. (Pet. App. at 7a; 923 F.2d at 660).

The court of appeals, however, construed the word "relating" to encompass only laws which were "addressed *exclusively* to airline service" (Pet. App. at 8a; 923 F.2d at 660, emphasis added). Laws of general application which "merely have an *effect* on airline services are not preempted" (*id.*, emphasis in original).

The court of appeals found no implied preemption because, since 1938, section 1506 has preserved all state law. The mere existence of section 1506, indicated the court, demonstrated "that Congress did not impliedly preempt West's state law claims under the FAA" (Pet. App. 9a-10a; 923 F.2d at 661).

Concerning conflict preemption, the court below reviewed 14 C.F.R. § 250.9(b). That provision, set forth in Pet. App. 34a-36a, grants the passenger an option to accept denied boarding compensation or reject it and "seek to recover damages in a court of law." Without citation, the court determined that the federal regulation referred to recovery under "state common law remedies," as opposed to a uniform federal law which would be enforced in both state and federal courts alike (Pet. App. 10a; 923 F.2d at 661).

Northwest filed a petition for rehearing with a suggestion for rehearing en banc. The petition was granted and the court amended its opinion. It maintained its holding that state law causes of action for compensatory damages were not preempted. It held, however, that West's claim for punitive damages was preempted (Pet. App. 10a; 923 F.2d at 661).

West's petition for rehearing of the amended opinion was denied. On October 1, 1991, West's Petition for Writ of Certiorari, Docket No. 91-505, was received and this Cross-Petition followed.

REASONS FOR GRANTING THE CROSS-PETITION

I

The Decision Below Constitutes a Clear Departure From Existing Law and Directly Conflicts With the Law of Three Other Circuits.

The Fifth Circuit has specifically held that "Section 1305, which is entitled 'Federal Preemption' expressly preempts state law. . ." in a case of a loud and boisterous passenger who was denied a seat. *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.) *cert denied*, 490 U.S. 1106 (1989). Moreover, in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, ____U.S.____, 111 S.Ct. 308 (1990), *subsequent decision*, 924 F.2d 1055 (5th Cir. 1991) (Mem.), *petition for cert. filed sub nom. Morales v. Trans World Airlines, Inc.*, No. 90-1604, the Fifth Circuit "concluded that § 1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising" (*id.* at 783). Section "1506 does not preserve state law remedies when there is express preemption under § 1305" (*id.*). Concerning the petition for certiorari in *Morales*, *supra*, on June 10, 1991 the Solicitor General was invited

to express the views of the United States, ____U.S.____, 111 S. Ct. 2794 (1991).

The decision below is also in conflict with the law in the Seventh Circuit. In *Illinois Corp. Travel v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, ____U.S.____, 110 S. Ct. 1948 (1990), a travel agency, which was prohibited from advertising that it discounted the airline's tickets, alleged violations of the state's Consumer Fraud and Deceptive Business Practices Act, as well as state common law rules such as the prohibition against tortious interference with respective contractual advantage. Holding that state law was expressly preempted, the court held: "If state law relates to 'rates, routes, or services,' the absence of contrary federal law is irrelevant" (*id.* at 754).

Furthermore, the District of Columbia Circuit in *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987), held that where a blind attorney was denied a seat in an emergency exit row, state law obligations to give courteous service were "expressly preempted" by § 1305.

The holding of the Ninth Circuit is clearly in conflict with these decisions.

II

Congress Expressly Preempted Airline Rates, Routes and Services From the Balkanization of Conflicting State Laws.

From the passage of the Civil Aeronautics Act of 1938 through the present, Congress has realized and required that the nation's airline industry be regulated in a uniform and coherent manner. From its inception, the Civil Aeronautics Board took a leading role, and the courts deferred in accordance with the doctrines of primary jurisdiction and exhaustion of remedies. With the enactment of the Airline Deregulation Act in 1978, Congress emphasized

the importance of "competitive market forces, to determine the quality, variety, and price of air services." Pub. L. No. 95-504, 92 Stat. 1705 (1978) discussed in *Trans World Airlines Inc. v. Mattox*, 897 F.2d 773, 777 (5th Cir.), *cert denied*, ____U.S.____, 111 S. Ct. 307 (1990), *subsequent decision*, 924 F.2d 1055 (5th Cir. 1991) (mem.), *petition for cert. filed sub nom. Morales v. Trans World Airlines, Inc.*, No. 90-1604. As the guiding hand of the Civil Aeronautics Board was shifted to the invisible hand of market forces, Congress expressly added a specific preemption provision, §1305. The House Committee on Public Works and Transportation noted that a "specific provision on the jurisdiction of the States and the Federal Government over airlines" was needed to prevent "uncertainties and conflicts. . . ." H. R. Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978), *Reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52, as cited in *Mattox*, 897 F.2d at 777. The Committee intended §1305 to "prevent conflicts and inconsistent regulations" insuring that "no state may regulate that carrier's routes, rates or services." H.R. Rep. No. 1211 at 16.; 1978 U.S. Code Cong. & Admin. News at 3752, as cited in *Mattox*, *supra*, 897 F.2d at 777. As concluded by the First Circuit, "Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989).

Nader v. Allegheny Airlines, 426 U.S. 290 (1976), another denied boarding case, was decided two years before §1305 was enacted. It did not deal, therefore, with that section's express preemption of state law. *See also, In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267 (2d Cir.), *cert. denied sub nom. Rein v. Pan American World Airways, Inc.*, 60 USLW 3293 (1991), where, in a case involving recoverable damages in international air transportation governed by the Warsaw Convention, the court held that state law was preempted (*id.* at 1273). The

Second Circuit determined that courts should look to federal law and apply the "most appropriate [federal] analog" (*id.* at 1279) in order to assure uniform interpretation throughout the United States (*id.* at 1278).

Northwest does not seek to deny West his day in court. He may certainly sue in state or federal forums pursuant to 14 C.F.R. 250.9(b). When he does, however, pursuant to § 1305 all state law is preempted.

CONCLUSION

We ask the Court to grant a writ of certiorari.

Dated: October 31, 1991

Respectfully submitted,

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BRIEF IN RESPONSE TO CROSS-PETITION

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November 1991

QUESTION PRESENTED

Did the court of appeals correctly find that cross-respondent's state common law claim for compensatory damages is not preempted by section 105 of the Federal Aviation Act when a separate provision of that law expressly preserves state common law remedies and when there is no indication that Congress intended section 105 to be given such a sweeping reading?

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BRIEF IN RESPONSE TO CROSS-PETITION

Northwest Airlines does not oppose Mr. West's petition in No. 91-505, which focuses on the punitive damages portion of the decision below. Instead, it asks the Court also to review the compensatory damages portion of that ruling, arguing that: (1) the Ninth Circuit's reasoning conflicts with rulings in other circuits regarding the preemptive effect of section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1), and (2) Congress expressly intended that "*all* state law is preempted" by section 105(a)(1), a ruling which the district court adopted here, but which the Ninth Circuit rejected. Cross-petition at 9 (emphasis added).

We agree with Northwest's first point that a conflict exists which the Court should resolve. Thus, we do not oppose the cross-petition, even though we dispute Northwest's second point (which

is really an argument on the merits) that the judgment below is wrong. We address each point in turn.

1. The Ninth Circuit held that section 105 does not preempt state laws which regulate conduct on an across-the-board basis, but does preempt state laws which single out airlines or transportation companies for special treatment. Northwest is correct that this analysis is at odds with that adopted in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S. Ct. 308 (1990), *subsequent decision*, 924 F.2d 1055 (1991)(mem.), *pet. for cert. pending sub nom. Morales v. Trans World Airlines, Inc.*, No. 90-1604 ("*Morales*"). Indeed, the Ninth Circuit's analysis would produce exactly the opposite result that *Morales* reached, *i.e.*, a holding that Texas laws proscribing false and deceptive practices are not preempted because they apply to all industries, not just airlines.

In our view, the results in these two cases differ because the Ninth Circuit's reading of section 105 is a better approximation of congressional intent than the broad interpretation adopted by *Morales*, as we discuss in point 2 below. For present purposes, however, we confine ourselves to discussing the conflicting state of the law on this issue.

Northwest's cross-petition asks the Court to decide what the relation is between section 105, which preempts state laws "relating to rates, routes, or services," and section 1106 of the Federal Aviation Act, 49 U.S.C. App. § 1506, which states that nothing in that Act "shall in any way abridge or alter the remedies now existing at common law or by statute." Section 105 was adopted as part of the Airline Deregulation Act of 1978, which was enacted two years after this Court's decision in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). *Nader* held that section 1106 allows a bumped passenger to pursue a state common law tort remedy even though the Civil Aeronautics Board may be simultaneously examining overbooking practices, and the Deregulation Act left section 1106 intact. Questions about the interaction of sections 105 and 1106 have arisen in a number of cases, and the lower courts have taken a variety of analytical approaches.

Northwest appears to be arguing that section 105 repealed section 1106 by dint of its subsequent enactment. Although repeals by implication are not favored, *see Watt v. Alaska*, 451 U.S. 259, 266-67 (1981), the Fifth Circuit adopted this reasoning in

O'Carroll v. American Airlines, Inc., 863 F.2d 11, 13, *cert. denied*, 490 U.S. 1106 (1990)(alleging tortious refusal to carry passenger), cited in cross-petition at 6-7. In *Morales*, the Fifth Circuit took a slightly different tack, holding that section 1106 "does not preserve state common law remedies when there is express preemption under" section 105, 897 F.2d at 783, but offered no guidance in determining which state law claims are preserved and which ones are preempted (other than the false advertising claims found to be preempted there).

Still other cases have held that the "relating to rates, routes, or services" language in section 105 is both clear on its face and broad in its sweep. *E.g.*, *Illinois Corp. Travel v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1990)(preempting tortious interference with contract and other claims); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987)(preempting tortious refusal to provide courteous service); *cf. Abourezk v. New York Airlines*, 895 F.2d 1456, 1459 (D.C. Cir. 1990)(Edwards, J., concurring)(suggesting that false imprisonment preempted). The problem with this analysis is that it can produce results which Congress could not possibly have intended. *See English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990). *See also People of the State of New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 176-77 (S.D.N.Y. 1989).

To illustrate the point, suppose that an airline operates an aircraft negligently, and there is a crash that kills everyone on board. In domestic accidents, liability and damages are assessed under state tort law. Such damage awards surely "relate to" an airline's "services" at some abstract level, yet it would be absurd to assume that Congress enacted section 105 with either an explicit or implicit intent to strip crash victims and their families of a remedy, and several courts have so held, rejecting preemption arguments out of hand. *See In re Air Crash Disaster at John F. Kennedy Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 721 F. Supp. 1185, 1187 (D. Colo. 1989); *cf. In re Mexico City Air Crash of Oct. 31, 1979*, 708 F.2d 400, 407-08 (9th Cir. 1983)(declining to recognize right of recovery under federal law and apparently assuming state tort laws not preempted).

It is difficult to see how the "relating to" language in section 105 is so plain on its face that it commands a preemptive result in

tort suits such as *O'Carroll*, *Illinois Corp. Travel* and *Anderson*, but not in tort suits involving aviation accidents. Nor is this the only area where anomalies abound. For example, one court held that section 105 preempts a state law breach of contract suit by Frontier Airlines against United Airlines over the way that United handled Frontier's fares in United's computer reservation systems. *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1407-09 (D. Colo. 1989). Yet section 105 posed no barrier in another court to Alaska Airlines recovering a damage award (also against United) in a virtually identical breach of contract suit which was brought under Alaska law. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F.2d 1400 (9th Cir. 1990).

Questions about the reach of section 105 have also arisen in other contexts without producing a clear or predictable analytical pattern. *Air Transport Ass'n v. Public Utilities Comm'n of the State of California*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), upheld a PUC rule barring telephone customers from surreptitiously overhearing or recording conversations without notice to the parties to that conversation. Although that rule affected the airlines' ability to monitor their ticket agents' answers to telephone calls seeking information "relating to rates, routes, or services," no preemption was found. In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984), the court split the difference in a suit by a blind passenger who was denied boarding because the airline required blind passengers to sit in bulkhead seats and none was available. Section 105 was held to preempt a state law claim barring discrimination against handicapped passengers, but not a claim for intentional infliction of emotional distress based on the passenger's treatment by the gate agent. *Id.* at 1415-16. And in *Bieneman v. City of Chicago*, 864 F.2d 463, 470-73 (7th Cir. 1988), common law remedies for airport noise or pollution were held not to be preempted.[1]

Each of these cases can arguably be distinguished in some

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[1] Apart from these situations, the proper interpretation of section 105 has been an issue in various other tort or contract cases which have not yet been decided by federal appellate or state supreme courts. *E.g.*, *Vail v. Pan Am Corp.*, 752 F. Supp. 648 (D.N.J. 1990)(adequacy of airline and airport security programs); *Wolens v. American Airlines*, 207 Ill. App. 3d 35, 565 N.E.2d 258 (1990)(frequent flyer programs).

way, and for that reason one could argue that the Court should wait for a case which creates a direct conflict on precisely the same point of law. The Solicitor General recommended that approach in *Morales*, where he urged that Texas' petition be denied and that questions about the preemptive scope of section 105 as applied to state regulation of airline advertising be allowed to percolate among the lower courts until a square conflict arises on that very point. Brief for the United States as *Amicus Curiae* in Nos. 90-1604 and 90-1606, at 22-23.

Even if the Court were inclined to take that approach in that specific context, *i.e.*, state efforts to regulate advertising that is also subject to federal regulation, the arguments for denying review are weaker in the broader context of common law private actions such as this case. As the cited cases illustrate, questions about the interaction of state law claims and sections 105 and 1106 can arise in a variety of contexts. The lower courts have been unable to agree on a uniform method of analyzing these issues, and intervention by this Court will help resolve the present confusion, which appears otherwise likely to continue. For these reasons, we do not oppose Northwest's cross-petition.[2]

2. Northwest also argues that review is warranted because Congress expressly preempted "*all* state law" in order to prevent the balkanization of conflicting state and federal regulations. Cross-petition at 9 (emphasis added). This is not really a separate reason to grant review so much as it is a summary of Northwest's argument on the merits, which we answer first by posing a few questions which Northwest has never been able to answer.

If, as Northwest argues, Congress decided in 1978 to enact the preemptive language in section 105 which is said to be so sweeping, why did Congress leave intact section 1106, which

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[2] Apart from Northwest's cross-petition and the *Morales* petition, the scope of section 105 is before the Court in a third context. In *Public Utilities Comm'n of the State of California v. Federal Express Corp.*, No. 91-502, the Court is being asked to review a ruling that section 105 preempts state motor carrier regulation insofar as it affects Federal Express's ability to carry packages on intrastate routes within California. 936 F.2d 1075 (9th Cir. 1991). Of the pending cases, we believe that our petition and Northwest's cross-petition present the best vehicles for providing guidance to the lower courts on the myriad situations in which preemption issues arise.

preserves state common law rights, which had been on the books unchanged for the preceding 40 years, and which this Court had construed only two years previously in *Nader*? And if section 105 really preempts "all" state law, what tort remedy is available to crash victims and their families? Since the Airline Deregulation Act did not create any federal causes of action, are victims supposed to pursue tort claims as a matter of federal common law? Or do they have no rights at all?

Moreover, the argument that Congress wanted section 105 to have a broad preemptive effect relies on cases construing similar "relating to" language in ERISA, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Northwest made this argument below, as did the Solicitor General in his brief in *Morales* (at 8-9). There are, however, two problems with this claim, apart from the enduring presence of section 1106.

First, this Court emphasized in a case decided the same day as *Shaw* that the preemption clause in ERISA is "virtually unique." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). Thus, the preemptive intent which Congress had in the pension context cannot be readily imputed to other statutes. *See Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 56 (2d Cir. 1988)(a broad reading of ERISA's "relating to" language should be "confined to the ERISA regulatory scheme").[3]

Second, Northwest ignores legislative history which identifies the specific problem which Congress wanted section 105 to solve. Congress was concerned about an emerging pattern of state regulatory bodies second-guessing route and rate decisions of the Civil Aeronautics Board. Having made a policy decision to end the federal government's authority to tell airlines where they can fly and how much they can charge, Congress thought that it would make little sense to let the 50 states try to fill that vacuum with

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[3] In our view, the precise reach of a preemption statute can rarely, if ever, be determined by looking at results under other laws. For example, whatever the Court may find to have been Congress's intent in *Cipollone v. Liggett Group Inc.*, No. 90-1038, or any other pending preemption case will not explain what the 95th Congress meant when it amended the Federal Aviation Act to add section 105 while retaining section 1106 unchanged.

their own notions of what is a reasonable fare or how many airlines should operate on a given route, even within their own borders. *See* S. Rep. No. 95-631, 95th Cong., 2d Sess. 98 (1978); H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 15-16 (1978); H.R. Conf. Rep. No. 95-1779, 95th Cong., 2d Sess. 94-95 (1978). One searches the legislative history in vain for evidence that the advent of economic deregulation was intended to abolish the states' ability to provide tort remedies to its citizens or to enforce private contracts.

One case illustrates our answer to the claim that section 105 must be read broadly in order to prevent an undesirable balkanization in the law. In *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 389 N.W.2d 507 (Minn. 1986), a state agency tried to deny an airline a license to operate an interstate air ambulance service. In overturning that ruling, the Minnesota Supreme Court held that section 105 may bar the states from making such licensing decisions, but it does not "oust the state from its traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment standards, and the promulgation of standards for maintenance of sanitary conditions." *Id.* at 509. Thus, state and federal laws affecting airlines can indeed co-exist.

These points help to explain our earlier statement that the decision below more accurately mirrors congressional intent than does the contrary decision in *Morales*. We believe that it takes a considerable leap to extrapolate from the legislative history a conclusion that Congress wanted to preempt "all" state law, but we recognize that the lower courts have taken disparate approaches in defining the preemptive scope of section 105 and do not oppose the cross-petition for that reason.

CONCLUSION

Mr. West's petition in No. 91-505 should be granted, and he does not oppose granting this cross-petition.

Respectfully submitted,

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